Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	
Elimination of Part 41 Telegraph	)	CC Docket No. 98-119
and Telephone Franks	)	
	)	

REPORT AND ORDER

Adopted: December 22, 1998 **Released:** February 3, 1999

By the Commission: Commissioner Furchtgott-Roth issuing a separate statement.

I. INTRODUCTION

1. In this Report and Order we eliminate, *in toto*, Part 41 of the Commission's rules governing the issuance of franks and certain reports by communications common carriers.[1] Franks enable authorized persons to send "interstate or foreign telephone or telegraph" messages, free of charge or at reduced rates, over communications facilities.[2] Pursuant to section 210(a) of the Communications Act of 1934, as amended, communications common carriers may issue franks and passes to other common carriers, including other communications common carriers, for the benefit of the officers, agents, and employees of the common carrier that receives the franks, and their families.[3] Part 41 also governs the issuance of "reports of positions of ships at sea furnished to newspapers of general circulation without charge, or at nominal charges, as authorized by section 201(b) of the Act."[4] Part 41 requires carriers to retain records of these

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[1] 47 C.F.R. §§ 41.1 *et seq.*

[2] *See* 47 C.F.R. § 41.11.

[3] 47 U.S.C. § 210(a). Part 41 was adopted pursuant to section 210(a) which provides, in pertinent part:

> Nothing in this Act or in any other provision of law shall be construed to prohibit common carriers from issuing or giving franks to, exchanging franks with each other for the use of, their officers, agents, employees, and their families, or subject to such rules as the Commission may prescribe, from issuing, giving, or exchanging franks and passes to or with other common carriers not subject to the provisions of this Act, for the use of their officers, agents, employees, and their families.

We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

[4] 47 C.F.R. § 41.31(c); 47 U.S.C. § 201(b).

activities and imposes other restrictions and requirements.[5]

2. Franks (or "passes") were developed by railroads and steamship companies in the nineteenth century to provide transport at special rates for certain classes of customers including company employees. As used by railroads, franks and passes were authorized pursuant to the terms of the Interstate Commerce Act of 1887, as amended.[6] Regulation governing franks and passes issued by telecommunications carriers was carried over from this statute by Congress and became Section 210 of the original Communications Act in 1934.[7] Historically, the Commission in Part 41 restricted the use of franks and adopted other reporting requirements out of a concern that carriers could use franks in anticompetitive ways. For example, a monopolist or a carrier with significant market power could use franks excessively, reducing costs for certain customers and shifting the costs of providing that service onto its other ratepayers. In this Report and Order, we determine that Part 41 rules are no longer necessary given the development of competition in interstate and international telecommunications markets.

3. Moreover, we note that, as competition has developed in interstate and international telecommunications markets, the use of franks apparently has declined significantly. Today, telecommunications carrier franking, where it is practiced at all, appears to be largely limited to the provision of "concession service" to current or retired company employees. Such franks are not, pursuant to the explicit terms of section 210, regulated by the Commission at all.[8] Nevertheless, *all* interstate and international carrier franking practices are at least subject to the reporting requirements imposed by Part 41.[9] Given the limited use of the franking privilege by today's carriers, eliminating Part 41 will remove what is essentially vestigial regulation that has little or no relevance to the telecommunications world of today.

4. This common sense action is consistent with our overall effort to reduce regulation wherever conditions warrant and also is consistent with our statutory obligation under new section 11 of the Communications Act. Section 11 requires the Commission to review its regulations applicable to providers of telecommunications service and to determine whether any

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[5] *See* 47 C.F.R. §§ 41.1 *et seq.*

[6] 49 U.S.C. §§ 10101 *et seq.*, 10722.

[7] In an explanatory statement entered in the Congressional Record, Representative Sam Rayburn indicated that section 210(a) is "based upon section 1(7) of the Interstate Commerce Act." 78 Cong. Rec. 10313-10314. Rayburn further explained that the provision "carries over existing law permitting communications companies to exchange franks for messages and to exchange such franks with railroads for passes." *Id.*

[8] *See* 47 C.F.R. §§ 41.1 *et seq.* Section 210(a) states that the Commission may regulate the issuance of franks by common carriers subject to the Communications Act (referred to here as "communications common carriers") to common carriers *not* subject to the Communications Act, *e.g.* railroads and steamship companies. 47 U.S.C. § 210(a). Section 210(a) does not specifically grant the Commission the authority to regulate the issuance of franks from communications common carriers to other communications common carriers or to themselves. Nevertheless, the Commission has imposed recordkeeping requirements even in these latter cases. *See* 47 C.F.R. § 41.31(b).

[9] *Id.* These records must be produced upon Commission demand.

rule is "no longer necessary in the public interest as the result of meaningful economic competition between providers of telecommunications service."[10] In this Report and Order, we apply section 11 criteria to the record in this proceeding and we conclude that Part 41 is no longer necessary in the public interest. Accordingly, we eliminate Part 41 in its entirety.

II. BACKGROUND

5. We commenced this proceeding by adopting a Notice of Proposed Rulemaking pursuant to our 1998 biennial review of regulations as required by section 11.[11] In the Notice we recognized that section 210(a) authorizes a *per se* class of lawful preferences that otherwise might be prohibited as unlawful pursuant to the terms of section 202(a).[12] Part 41 of the rules -- adopted over 60 years ago in an era of monopoly and oligopoly communications services markets -- codifies our historical regulation of such lawful preferences.[13] As noted above, the Commission has applied this regulation to carriers issuing franks both to communications common carriers regulated by the Act and to other carriers *not* subject to the Act, such as railroads.

6. We proposed to eliminate Part 41 as it applies in all such cases because we tentatively concluded that the development of competition (or the prospect of competition) in interstate and international telecommunications service markets has rendered Part 41 regulation unnecessary to prevent anticompetitive abuses that could arise from the issuance of franks in connection with those services.[14] For the same reason, we proposed to eliminate regulation of

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[10] 47 U.S.C. § 161(a)(2).

[11] *See In the Matter of 1998 Biennial Regulatory Review -- Elimination of Part 41 Telegraph and Telephone Franks*, Notice of Proposed Rulemaking, CC Docket No. 98-119, 13 FCC Rcd 14525 (1998) (hereinafter, Notice).

[12] Notice at para. 3. Section 202(a) states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . . or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality . . . ." 47 U.S.C. § 202(a). *See also Rules Governing the Issuance of Telegraph Franks*, Opinion and Rules, 1 FCC 291 (adopted Feb. 13, 1935) (*1935 Telegraph Franks Order*).

[13] *Id.* at paras. 9-11; 15 (Part 41 rules adopted "at a very different time than the world of today, *i.e.*, a time when firms providing interstate and foreign services faced a vastly different set of statutory, regulatory, economic, and operational barriers").

[14] *See* Notice at paras. 6-20 (applying competition based analysis to domestic interstate and international services, including wireless services. "In point of fact, almost all of the 'interstate and foreign telegraph or telephone' services that are the subject of Part 41 regulation per franks and reports are now provided in markets that the Commission has found to be competitive." Notice at para. 11. "We believe that the discipline of competitive markets exists to restrict almost any conceivable misuse of the franking privilege, a privilege that is, we note, guaranteed by statute." Notice at para. 15.).

The Commission expressly included wireless communications markets in its analysis and tentative conclusions even though we expressed uncertainty whether wireless carriers utilize franks. We expressed our belief that actions

common carrier-furnished reports of positions of ships at sea pursuant to section 41.31(c).[15] We instructed parties who might want us to retain some form of Part 41 regulation to undertake an economic cost-benefit analysis in order to justify their recommendations.[16]

III. DISCUSSION

7. No commenter[17] challenges our analysis and tentative conclusions, as set out in the Notice, that the development of competition in interstate and international markets, including wireless markets, complemented by the availability of our accounting rules and complaint processes, obviates the need for Part 41 regulation of franks issued in connection with such services.[18] We observed in the Notice that Part 41 was developed in an era of telecommunications monopolies and oligopolies specifically in order to prevent anticompetitive use of the franking privilege by regulated carriers. Under such market conditions, regulation was required to ensure that carrier monopolists and oligopolists did not use franking "excessively," *i.e.*, to unlawfully favor certain customers and at the expense of ratepayers.[19] As we recognized in the Notice, however, competition has developed in interstate and international markets, including wireless markets, and today those markets are sufficiently competitive so as to permit our actions here.[20]

8. The Commission has consistently found that nondominant carriers who operate in competitive markets are prevented from acting anticompetitively by the discipline of such markets.[21] Given the development of competition in interstate and international

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eliminating Part 41 regulation would, in any event, "remove at least potential regulatory burdens imposed on such carriers." Notice at para. 17.

[15] Notice at para. 19.

[16] *Id.* at para. 20.

[17] Five parties filed comments in this proceeding: Ameritech, BellSouth Corporation (BellSouth), MCI Telecommunications Corporation (MCI), SBC Communications Inc. (SBC), and the United States Telephone Association (USTA). No reply comments were filed.

[18] *See* Ameritech Comments at 2 (Part 41 regulation unnecessary to prevent anticompetitive conduct; repeal will not adversely affect ratepayers); BellSouth Comments at 1; SBC Comments at 1-3 ("strongly supports" analysis and conclusion to eliminate Part 41, but objects generally to "narrow view" Commission has taken of the section 11 biennial review process); USTA Comments at 1-3 (supports proposal, franks no longer widely used). *See also* MCI Comments at 1("does not take issue" with eliminating Part 41 provided Commission issues appropriate clarification about scope of action). MCI's requested clarification is addressed in paragraph 11, *infra*.

[19] Notice at paras. 9-20.

[20] *Id.* at paras. 11-14.

[21] *See e.g.*, *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Order, FCC 96-424, CC Docket No. 96-61, 11 FCC Rcd 20730, at paras. 8-13 and 21 (rel. Oct. 31, 1996) (*IXC Detariffing Order*) (including a detailed history of the

telecommunications service markets recited in the Notice, we conclude that Part 41 regulation is unnecessary to prevent anticompetitive abuses that could arise from the issuance of franks in connection with those services. Simply put, any carriers that might attempt unlawfully to use franking to favor certain classes of customers at the expense of other classes of customers ordinarily will face competitors who will underprice them. We also find that the continued availability of our accounting rules and complaint processes will protect customers in extraordinary cases, as well as ratepayers generally. Given the continued availability of these rules and processes, we specifically conclude that no special recordkeeeping or reporting of franks or carrier-issued "reports of positions of ships at sea" pursuant to Part 41 is necessary to protect consumers or, for that matter, competitors.[22]

9. As a result, and based on our analysis of the record, we affirm our tentative conclusions, as set out in the Notice, that we may eliminate Part 41 requirements as they apply to franks for interstate and international services as issued by common carriers regulated by the Act to common carriers regulated by Act, as well as to common carriers not regulated by the Act; and also as they apply to any franks for interstate and international services as may be issued by wireless common carriers regulated by the Act to common carriers not regulated by the Act and to others. Based on our analysis of the record, we also affirm our tentative conclusion, as set out in the Notice, that we may eliminate Part 41 requirements as they apply to carrier-issued "reports of positions of ships at sea" authorized pursuant to section 201(b) of the Act.

10. We take special note of the case posed by interstate access services. Although in the Notice we found it difficult to imagine how franks could be utilized in connection with interstate access service, we asked commenters to address any specific concerns that might arise given that this service is still largely provided by dominant local exchange carriers.[23] We tentatively concluded that Part 41 regulation could be eliminated even in this case given the statutory limitations imposed on the franking privilege by section 210(a), the availability of our accounting rules and complaint processes to detect and deter any anticompetitive abuses, and the threat of competitive entry by local service competitors as promoted by the 1996 Act.[24]

Commission's deregulatory actions in the *Competitive Carrier* proceeding and stating the Commission's belief that market forces will generally act to ensure that the rates, practices and classifications of nondominant interexchange carriers are just and reasonable and not unjustly or unreasonably discriminatory), *stayed pending review sub nom, MCI Telecommunications Corp. v. FCC*, Case No. 96-1459 (D.C. Cir., Feb. 19, 1997), *Order on Reconsideration*, FCC 97-293 (rel. Aug. 20, 1997).

[22] The Commission's complaint and investigation powers would be available, for example, in cases where ratepayers or competitors allege that a carrier has issued franks in violation of the limitations set out in 47 U.S.C. § 210(a).

[23] Notice at para. 18.

[24] *Id.*

11. Again, no commenter disagrees with this analysis,[25] and we affirm this analysis and our tentative conclusion in the Notice that Part 41 requirements are unnecessary to prevent anticompetitive abuses associated with franks that might be issued in connection with carrier-provided interstate access service. While agreeing with this outcome, MCI nevertheless asks us to clarify that elimination of Part 41 will not confer any additional flexibility on dominant carriers vis-a-vis their continuing obligations under section 203(c) of the Act, including pricing flexibility,[26] and that elimination of Part 41 will affect only "[the] regulations applicable under section 210(a) dealing with the issuance of [*sic*] employees and families."[27] We view such a declaration as axiomatic given our analysis here and in the Notice. Nevertheless, in order to avoid any confusion about the effect of our actions in this Report and Order, we state that eliminating Part 41 will only affect the exercise of the privileges that are statutorily recognized by section 210(a) -- plus those privileges recognized by section 201(b) -- and will not affect other obligations imposed by the Act, or confer any additional pricing flexibility on dominant or other carriers.

12. Finally, we note that we do not discuss issues relating to the requested economic cost-benefit analysis since all commenters agree that we can or should eliminate Part 41 in its entirety. As a result, no commenter submitted a cost-benefit analysis for consideration.[28]

IV. CONCLUSION

13. For the reasons set out in this Report and Order, we affirm all our tentative conclusions in the Notice and find that the development of competition (or its prospect) in all communications services markets will act to restrict any misuse of the franking privilege guaranteed by section 210(a) of the Act, or misuse in connection with certain reports authorized by section 201(b) of the Act, and that, in any event, the Commission's complaint procedures and investigatory powers are available and sufficient to prevent abuses in extraordinary cases. Section 11 of the Act directs the Commission to conduct a biennial review of its regulations applicable to providers of telecommunications services in order to determine whether any of these regulations are "no longer necessary in the public interest as the result of meaningful economic

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[25] *See* Ameritech Comments at 2-3; BellSouth Comments at 2-3; SBC Comments at 3; USTA Comments at 2-3.

[26] MCI Comments at 1. Section 203(c) states : "No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communications unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." 47 U.S.C. § 203(c).

[27] *Id.* at 2.

[28] *See* para. 6, *supra.* We note that BellSouth "strongly supports" the statement in the Notice that the Commission "will not maintain a regulation pursuant to the section 11 public interest analysis where [the Commission determines] that the costs of the regulation exceed the benefits." BellSouth Comments at 3.

competition between providers of such service."[29] Based on our application of this standard in the instant proceeding and on our analysis of the record, we affirm our tentative conclusion in the Notice that Part 41 of the rules is no longer necessary to protect consumers and competitors. Accordingly, we eliminate Part 41 of the rules in its entirety.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

14. As required by the Regulatory Flexibility Act (RFA),[30] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Elimination of Part 41 NPRM*.[31] The Commission sought written public comment on the proposals in the *Elimination of Part 41 NPRM*, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[32]

A. Need for, and Objectives of, the Proposed Action.

15. The Commission undertakes this examination of Part 41 of its rules as a part of its 1998 biennial review of regulations as required by section 11 of the Communications Act, as amended.[33] Our objective is to reduce or eliminate unnecessary or duplicative regulatory requirements as competition supplants the need for such requirements, consistent with section 11 of the Communications Act, as amended,[34] and the Telecommunications Act of 1996.[35] In this Order, we eliminate, *in toto*, Part 41 of the Commission's rules governing the issuance of franks and of certain reporting requirements of communication common carriers to retain records of positions of ships at sea used to furnish newspapers of general circulation without charge, or at a nominal fee, as authorized by section 210(b) of the Act.[36] We conclude that Part 41, and its restrictions on these statutorily-authorized privileges, has become unnecessary due to the

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[29] 47 U.S.C. § 161.

[30] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[31] *1998 Biennial Regulatory Review -- Elimination of Part 41 Telegraph and Telephone Franks*, Notice of Proposed Rulemaking, CC Docket No. 98-119, FCC 98-152, 13 FCC Rcd 14525 (rel. July 21, 1998).

[32] *See* 5 U.S.C. § 604.

[33] 47 U.S.C. § 161.

[34] 47 U.S.C. § 161.

[35] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.* *See* Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996) (Joint Explanatory Statement).

[36] 47 C.F.R. §§ 41.1 *et seq.*

development of competition in interstate and international telecommunications service markets.[37]

B. Summary of Significant Issues Raised by Public Comments In Response to the IRFA.

16. No commenter challenges our analysis and tentative conclusions, as set out in the Notice, that the development of competition in interstate and international markets, complemented by the availability of our accounting rules and complaint processes, obviates the need for Part 41 regulation of franks and reports of ships at sea. Moreover, no commenter indicates that the elimination of Part 41 regulation would raise concerns that anticompetitive abuses of franking may occur among carriers. The Commission received only five comments in this proceeding, all of which agree that there is no longer a need to apply Part 41 regulation in light of the development of competition in interstate and international markets.[38]

C. Description and Estimate of the Number of Small Entities to Which the Proposed Action May Apply.

17. To estimate the number of small entities that would benefit from this positive economic impact, we first consider the statutory definition of "small entity" under the RFA. The RFA generally defines "small entity" as having the same meaning as the term "small business," "small organization," and "small governmental jurisdiction."[39] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities.[40] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[41] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.[42] We first discuss the number of small telephone companies falling within these SIC categories, then attempt to refine further those estimates to correspond with the categories of telephone companies

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[37] *See* Discussion, *supra.*

[38] *Id.* at ¶ 6.

[39] 5 U.S.C. § 601(6).

[40] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition in the Federal Register."

[41] 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

[42] 13 C.F.R. § 121.201.

that are commonly used under our rules.

18. We expect that the rules in Part 41 -- and the privileges regulated therein -- have only been utilized by a limited class of entities, specifically the Bell Operating Companies and certain other providers of local exchange and interexchange telecommunications services. Nevertheless, given that the language of sections 201(b) and 210(a) speaks broadly of "common carriers" we analyze a wide range of categories in an effort to identify the greatest number of small entities possible that could be effected by the decision adopted in this Order. Thus, in some cases below, we expect that not all of the entities within a given category offer common carrier services, let alone issue franks or reports of ships at sea pursuant to Part 41. In all cases, of course, entities affected by this Order would not lose any of their statutorily-granted rights under sections 201(b) or 210(a) and would enjoy a positive economic impact from reduced regulation of those privileges.

19. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS).[43] According to data in the most recent report, there are 3,459 interstate carriers.[44] These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.

20. Although some affected incumbent local exchange carriers (ILECs) may have 1,500 or fewer employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they are either dominant in their field of operations or are not independently owned and operated, and therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small ILECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small ILECs within this analysis and use the term "small ILECs" to refer to any ILECs that arguably might be defined by the SBA as "small business concerns."[45]

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[43] FCC, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997) (*Telecommunications Industry Revenue*).

[44] *Id.*

[45] *See* 13 C.F.R. § 121.201, SIC code 4813. Since the time of the Commission's 1996 decision, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (August 29, 1996), the Commission has consistently addressed in its regulatory flexibility analyses the impact of its rules on such ILECs.

21. *Total Number of Telephone Companies Affected.* The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[46] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[47] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by the decisions and rule changes adopted in this Order.

22. *Wireline Carriers and Service Providers.* SBA has developed a definition of small entities for telephone communications companies other than radiotelephone companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[48] According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.[49] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rule changes adopted in this Order.

23. *Local Exchange Carriers.* Neither the Commission nor SBA has developed a definition of small providers of local exchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).[50] According to our most recent data, 1,371 companies

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[46] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation,* Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) ("1992 Census").

[47] 15 U.S.C. § 632(a)(1).

[48] 1992 Census, *supra,* at Firm Size 1-123.

[49] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4813.

[50] *See* 47 C.F.R. § 64.601 *et seq.*

reported that they were engaged in the provision of local exchange services.[51] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,371 small entity LECs or small incumbent LECs that may be affected by the decisions and rule changes adopted in this Order.

24. *Interexchange Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone companies.[52] The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 143 companies reported that they were engaged in the provision of interexchange services.[53] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by the decisions and rule changes adopted in this Order.

25. *Competitive Access Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 109 companies reported that they were engaged in the provision of competitive access services.[54] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by the decisions and rule changes adopted in this Order.

26. *Operator Service Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we

[51] *Telecommunications Industry Revenue* at Fig. 2.

[52] 13 C.F.R. § 121.210, SIC Code 4813.

[53] *Telecommunications Industry Revenue* at Fig. 2.

[54] *Telecommunications Industry Revenue* at Fig. 2.

collect annually in connection with the TRS. According to our most recent data, 27 companies reported that they were engaged in the provision of operator services.[55] Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 27 small entity operator service providers that may be affected by the decisions and rule changes adopted in this Order.

27. *Resellers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies.[56] The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 339 companies reported that they were engaged in the resale of telephone services.[57] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the decisions and rule changes adopted in this Order.

28. *Wireless (Radiotelephone) Carriers.* SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[58] According to SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.[59] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned are operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions and rule changes adopted in this Order.

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[55] *Telecommunications Industry Revenue* at Fig. 2.

[56] 13 C.F.R. § 121.210, SIC Code 4813.

[57] *Telecommunications Industry Revenue* at Fig. 2.

[58] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation*, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) ("1992 Census").

[59] 13 C.F.R. § 121.201, SIC Code 4812.

29. *Cellular and Mobile Service Carriers.* In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the categories of radiotelephone carriers, Cellular Service Carriers and Mobile Service Carriers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to Cellular Service Carriers and to Mobile Service Carriers. The closest applicable definition under SBA rules for both services is for telephone companies other than radiotelephone (wireless) companies.[60] The most reliable source of information regarding the number of Cellular Service Carriers and Mobile Service Carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 804 companies reported that they are engaged in the provision of cellular services and 117 companies reported that they are engaged in the provision of mobile services.[61] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of Cellular Service Carriers and Mobile Service Carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 804 small entity Cellular Service Carriers and fewer than 138 small entity Mobile Service Carriers that might be affected by the decisions and rule changes adopted in this Order.

30. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[62] For Block F, an additional classification for "very small business" was added, and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[63] These regulations defining "small entity" in the context of broadband PCS auctions have been approved by SBA.[64] No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F. However, licenses for Blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS licenses will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by the SBA and the Commissioner's auction rules.

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[60] *Id.*

[61] *Telecommunications Industry Revenue* at Fig. 2.

[62] *See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, FCC 96-278, WT Docket No. 96-59, ¶¶ 57-60 (June 24, 1996), 61 FR 33859 (July 1, 1996); *see also* 47 C.F.R. § 24.720(b).

[63] *Id.*, at ¶ 60.

[64] *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

31. *SMR Licensees.* Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. The definition of a "small entity" in the context of 800 MHz SMR has been approved by the SBA,[65] and approval for the 900 MHz SMR definition has been sought. The rules proposed in this FRFA may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities, that may be affected by the decisions and rule changes adopted in this Order.

32. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees that may be affected by the decisions and rule changes adopted in this Order includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to small entities who may be affected by the decisions and rule changes adopted in this Order.

33. *220 MHz Radio Services.* Because the Commission has not yet defined a small business with respect to 220 MHz services, we will utilize the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[66] With respect to 220 MHz services, the Commission has proposed a two-tiered definition of small business for purposes of auctions: (1) for Economic Area (EA) licensees, a firm with average annual gross revenues of not more than $6 million for the preceding three years and (2) for regional and nationwide licensees, a firm with average annual gross revenues of not more than $15 million for the preceding three years. Given that nearly all radiotelephone companies under the SBA definition employ no more than 1,500 employees (as noted *supra*), we will consider the

[65] *See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool*, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

[66] 13 C.F.R. § 121.201, SIC Code 4812.

approximately 1,500 incumbent licensees in this service as small businesses under the SBA definition.

34. *Private and Common Carrier Paging.* The Commission has proposed a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging and exclusive Private Carrier Paging services.[67] Under the proposal, a small business will be defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than $3 million, or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than $15 million. Because the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[68] At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Telecommunications Industry Revenue* data, 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services, which are placed together in the data.[69] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of paging carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 172 small paging carriers that may be affected by the decisions and rule changes adopted in this Order. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

35. *Narrowband PCS.* The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded by auction. Such auctions have not yet been scheduled, however. Given that nearly all radiotelephone companies have no more than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, for purposes of this FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

36. *Rural Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.[70] A significant subset of the Rural

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[67] *See* 47 C.F.R. § 20.9(a)(1) (noting that private paging services may be treated as common carriage services).

[68] 13 C.F.R. § 121.201, SIC Code 4812.

[69] *Telecommunications Industry Revenue* at Figure 2.

[70] The service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).[71] We will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[72] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

37. *Air-Ground Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Air-Ground Radiotelephone Service.[73] Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[74] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA definition.

38. *Private Land Mobile Radio (PLMR).* PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities.[75] These radios are used by companies of all sizes operating in all U.S. business categories. The Commission has not developed a definition of small entity specifically applicable to PLMR licensees due to the vast array of PLMR users. For the purpose of determining whether a licensee is a small business as defined by the SBA, each licensee would need to be evaluated within its own business area.

39. The Commission is unable at this time to estimate the number of, if any, small businesses which could be impacted by the rules. However, the Commission's 1994 Annual Report on PLMRs[76] indicates that at the end of fiscal year 1994 there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the proposed rules in this context could potentially impact every small business in the United States.

40. *Fixed Microwave Services.* Microwave services include common carrier,[77] private-

[71] BETRS is defined in sections 22.757 and 22.759 of the Commission's rules, 47 C.F.R. §§ 22.757, 22.759.

[72] 13 C.F.R. § 121.201, SIC Code 4812.

[73] The service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

[74] 13 C.F.R. § 121.201, SIC Code 4812.

[75] *See* 47 C.F.R. § 20.9(a)(2) (noting that certain Industrial/Business Pool service may be treated as common carriage service).

[76] Federal Communications Commission, *60th Annual Report, Fiscal Year 1994*, at 116.

[77] 47 C.F.R. § 101 *et seq.* (formerly, Part 21 of the Commission's Rules).

operational fixed,[78] and broadcast auxiliary radio services.[79] At present, there are approximately 22,015 common carrier fixed licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this FRFA, we will utilize the SBA's definition applicable to radiotelephone companies -- *i.e.*, an entity with no more than 1,500 persons.[80] We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

41. *Offshore Radiotelephone Service.* This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico.[81] At present, there are approximately 55 licensees in this service. We are unable at this time to estimate the number of licensees that would qualify as small entities under the SBA's definition for radiotelephone communications.

42. *Wireless Communications Services.* This service can be used for fixed, mobile, radio location and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. We conclude that the number of geographic area WCS licensees that may be affected by the decisions and rule changes adopted in this Order includes these eight entities.

D. Description of Proposed Reporting, Recordkeeping, and Other Compliance Requirements.

43. The decisions and rule changes adopted in this Order will reduce the reporting and recordkeeping requirements on common carriers regulated under the Communications Act. Part 41 imposes specific limitations or requirements on carriers issuing franks to other carriers not

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[78] Persons eligible under Parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[79] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. § 74 *et seq.* Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[80] 13 C.F.R. § 121.201, SIC Code 4812.

[81] This service is governed by Subpart I of Part 22 of the Commission's Rules. *See* 47 C.F.R. §§ 22.1001 - 22.1037.

regulated by the Act, and on persons receiving such franks.[82] For example, subsections 41.31(a) and (b), *inter alia*, require common carriers issuing lawful franks to maintain records of issued franks. Similarly, subsection 41.31(c) imposes a recordkeeping requirement on carriers who provide "reports of positions of ships at sea to newspapers of general circulation, without charge, or at nominal charges" pursuant to section 201(b) of the Act.[83] The Order eliminates Part 41 which should provide a positive economic impact on affected companies, including small entities.

F. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

44. The impact of this proceeding should be beneficial to small businesses because the decisions and rule changes adopted in this Order will reduce the reporting or recordkeeping requirements on all communications common carriers. In the Elimination of Part 41 NPRM, we sought comment on whether any level of regulation currently within Part 41 should be retained.[84] No commenter suggests that there is a continuing need for any level of Part 41 regulation.

45. Report to Congress: The Commission will send a copy of this Order, 1998 Biennial Regulatory Review -- Elimination of Part 41 Telegraph and Telephone Franks, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of this Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this Order and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

VI. ORDERING CLAUSES

46. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i) and (j), 11, 201-205, 210, 218 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 161, 201-205, 210, 218, and 403, that a Part 41 of the Commission's Rules, 47 C.F.R. § 41.01 *et seq.*, IS ELIMINATED IN ITS ENTIRETY.

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[82] *See, e.g.*, 47 C.F.R. §§ 41.21, 41.22, 41.31, 41.32.

[83] 47 C.F.R. § 41.31(c) *and citing* 47 U.S.C. § 201(b).

[84] *See supra*, ¶ 20.

47. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this REPORT AND ORDER, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

PART 41 - TELEGRAPH AND TELEPHONE FRANKS

Part 41 of Title 47 of the Code of Federal Regulations (C.F.R.) is eliminated by deleting §§ 41.1 through 41.32 in their entirety.

Statement of Commissioner Harold W. Furchtgott-Roth

Re: 1998 Biennial Regulatory Review -- Elimination of Part 41 Telegraph and Telephone Franks, *Report and Order*, CC Docket No. 98-119

I support adoption of this Report and Order wherein, pursuant to the Commission's duty under Section 11(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sect. 161(b), we have repealed or modified regulations that we have determined to be no longer necessary in the public interest. The regulations at issue here were chosen for repeal or modification as part of the Commission's 1998 Biennial Review, which was conducted pursuant to Section 11(a) of the Act, *Id.* at Sect. 161(a). However, as thoroughly described in my *Report on Implementation of Section 11 by the Federal Communications Commission* (Dec. 21, 1998), which can be found on the FCC WWW site at <http://www.fcc.gov/commissioners/furchtgott-roth/reports/sect11.html>, I believe that the 1998 Section 11(a) review was not as thorough as it should have been. I look forward to working with the chairman and other commissioners on the 2000 Biennial Review, planning for which should begin in mid-1999.

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